Filed 12/16/08 In re R.V. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re R.V., et al., Persons Coming Under the Juvenile Court Law.	B204890 (Los Angeles County Super. Ct. No. CK56985)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. C.R., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Sherri Sobel, Referee. Reversed and remanded.

Donna Balderston Kaiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Kim Nemoy, Senior Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

C.R. (Mother) appeals from an order of the juvenile court terminating Mother's parental rights to her sons, R.V. and L.H. She seeks to invalidate all prior findings and orders, contending that the Los Angeles County Department of Children and Family Services (DCFS) failed to comply with the requirements of the federal Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.), as well as various requirements of recently enacted California statutes governing custody proceedings involving Indian children. (Welf. & Inst. Code, §§ 224 et seq.)[1] DCFS concedes error in failing to give notice of the dependency proceedings to a particular tribe, the Northern Cheyenne. We therefore reverse the order terminating parental rights and direct DCFS to comply on remand with the notice provisions of the ICWA, as discussed herein. As to Mother's other contentions of ICWA error, we conclude that the juvenile court committed error by failing to receive the required expert testimony before terminating parental rights, but find the error to have been harmless. We find no merit in Mother's remaining contentions of error in giving notice of the proceedings.

Mother further contends that the juvenile court erred in finding the boys were adoptable, and by refusing to apply two exceptions to adoption: the beneficial parental relationship and the sibling exceptions. (§ 366.26, subd. (c)(1)(B)(i) & (v).) We find no merit as to these contentions.

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[1] All undesignated section references are to the Welfare and Institutions Code.

FACTUAL AND PROCEDURAL BACKGROUND

The Jurisdiction and Disposition Hearings and ICWA Findings

On October 19, 2004, DCFS filed a petition regarding R.V. (born in January 2000), L.H. (born in December 2003), and J.R. (born in September 1988), the boys' half-sister. (§ 300.) DCFS alleged that Mother suffered from mental and emotional problems which limited her ability to care for the children, and that she was a methamphetamine user. Mother had been involuntarily hospitalized on three occasions for treatment of her psychiatric condition. The children were detained by the juvenile court and placed with a maternal aunt.

In a jurisdiction and disposition report, DCFS reported that Mother said she had Cheyenne heritage, but was not registered with a tribe. She said L.H.'s father was a registered member of the Blackfeet and Cherokee tribes. DCFS sent notice on November 15, 2004, to the Cherokee tribes, the Blackfeet tribe, the Cheyenne tribes, the Bureau of Indian Affairs (BIA), and the Secretary of the Interior for a hearing to be held the following day. At the hearing on November 16, 2004, the court ordered that additional notice be sent to the BIA and the tribes.

DCFS sent notice on November 29, 2004, to the tribes listed above, and to the BIA and the Secretary of the Interior, for a hearing on December 21, 2004. On that date, the section 300 petition was sustained (as amended), and DCFS was ordered to provide Mother with referrals for drug and alcohol testing, and establish a visitation schedule.

The disposition hearing was held in January 2005. The court ordered DCFS to provide family reunification services to Mother. Mother was ordered to participate in individual and psychiatric counseling, parenting classes, and drug counseling and drug testing. She was ordered to take all prescribed psychotropic medication. Monitored visitation was also ordered.

On February 23, 2005, DCFS filed a section 342 subsequent petition alleging that, in addition to the previously sustained allegations, domestic violence had occurred between Mother and L.H.'s father, P.H.[2] DCFS also filed a report for that date indicating a social worker had spoken with L.H.'s paternal grandmother, C.H., who stated she was registered with the Kaw and Cheyenne tribes, but her son, P.H., was not registered with any tribe. C.H. said she would care for the children if she could get suitable housing. The boys remained placed with their maternal aunt. Their 15-year-old half-sister, J.R., had been living there, but was removed when the aunt could not manage her behavioral problems; she was placed in a group home.

A psychosocial assessment for R.V., dated February 7, 2005, stated that he had been exposed to domestic violence and pornographic material by Mother and L.H.'s father since the age of two. He was enrolled in weekly individual therapy, and a medical assessment was recommended to evaluate possible impairment in his right eye. The report recommended that he attend Head Start and speech and language therapy.

DCFS filed letters from the United Keetoowah Band of Cherokee Indians in Oklahoma (dated January 20, 2005), the Eastern Band of Cherokee (dated December 8 and 13, 2004), the Cherokee Nation (dated December 2 and 8, 2004), and from the Blackfeet tribe (dated December 7, 2004), stating R.V. and L.H. were not members of their tribes, and not eligible for membership. The Cheyenne-Arapaho tribe responded by letter dated January 18, 2005, that the children were not Indian, but the notice to which the tribe responded did not include the names of L.H.'s grandparents. The Blackfeet requested completion of a family chart that included names of the children's grandparents.

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[2] The juvenile court sustained the section 342 petition on April 25, 2005.

On April 5, 2005, DCFS reported that it had received a telephone call from Roger Sober, a case worker from the Kaw Nation. Sober stated that the child L.H., his father, and his grandmother were not on the tribal rolls, but L.H. was eligible for enrollment and came within the ICWA. The lineage was traced to L.H.'s paternal great-grandfather. Sober stated that the Kaw Nation planned to intervene in the case. He requested that further notice of hearings be sent to P.O. Box 237, Newkirk, OK 74647, to his attention; he said his supervisor was Amy Oldfield. Accordingly, at a hearing held on April 5, 2005, the court found that L.H. is subject to the Indian Child Welfare Act, and transferred the matter to a different department for future proceedings.

Section 387 Petition and Removal from the Maternal Aunt

On April 29, 2005, DCFS filed a section 387 supplemental petition indicating the boys had been removed from their maternal aunt's care at her request. The aunt had submitted 7-day notices to remove the children at least five times in the past, but had always changed her mind. R.V. reportedly had significant behavioral issues for which he was receiving individual therapy, but the aunt had failed to ensure that R.V. attended his therapy sessions. She had also been inconsistent in transporting the children for visits with Mother. At a detention hearing on April 29, 2005, the court ordered the boys to be suitably placed in a foster home.

The Six-Month Review Hearing

DCFS submitted a report for the six-month status review hearing (§ 366.21, subd. (e)) scheduled for May 19, 2005, and an additional report for the continued hearing date of June 9, 2005. DCFS reported that the foster mother was interested in adopting the boys. DCFS indicated that Mother had not fully complied with her

drug testing requirements; she had several negative tests but had also missed tests. The social worker was unable to obtain any information about Mother's attendance at individual counseling because Mother had not consented to the release of her information. Mother's visitation had been inconsistent, due in part to the maternal aunt's missing visits. Mother had not complied with the requirement that she attend parenting classes. DCFS recommended termination of Mother's reunification services as to the boys.

The six-month review hearing was conducted on June 16, 2005. The court found that Mother had only partially complied with her reunification services, and ordered termination of her reunification services. The court found that R.V. and L.H. were a bonded sibling group, and ordered DCFS to attempt to locate an appropriate American Indian placement for them. The maternal aunt was permitted to have unmonitored visitation with the boys; Mother's visits were to remain monitored.

Mother's Requests for Reinstatement of Reunification Services

Mother filed a section 388 petition on September 21, 2005, requesting reinstatement of family reunification services based upon her progress in complying with her case plan. The court set the petition for hearing, however, Mother later withdrew her petition. The maternal aunt requested that the boys be returned to her care, but the court denied her request.

DCFS reported that Mother visited the children weekly for two hours. Visits went well, and the social worker observed a close bond between Mother and the boys. DCFS reported that R.V. continued to have behavioral problems. He was aggressive with both adults and children, he had emotional outbursts and cursed, and he frequently became fixated on food. DCFS indicated that the foster mother was no longer interested in adopting the children.

On April 12, 2006, Mother filed another section 388 petition, again requesting reinstatement of family reunification services based upon her progress in completing her case plan. The boys had been placed in numerous foster homes, and were in their fifth placement at that point. The court set the petition for hearing on June 26, 2006.

In a report dated April 25, 2006, DCFS indicated that Mother's visits had been sporadic because she had been ill. During visits, Mother sometimes talked to the children about adult issues regarding the dependency case. She had begun calling the DCFS office at odd hours of the night, saying that DCFS and the government had her under surveillance. Mother indicated that she had not taken her psychotropic medication.

DCFS also stated in its report that L.H.'s paternal grandmother, C.H., had moved to Oklahoma and wanted to adopt L.H. and R.V. A DCFS social worker conferred with Sober, the Kaw Nation social worker, who said a Native American family interested in adopting the boys had been located. DCFS recommended that a continuance be granted to enable the boys to visit with the family. DCFS also recommended that the Kaw Nation's motion to intervene be granted; however, the record does not contain a written motion to intervene. The court ordered DCFS to initiate an Interstate Compact for the Placement of Children (ICPC) to assess the paternal grandmother's home in Oklahoma, and also requested that the Kaw Nation do a full home study on the prospective adoptive family. The court further ordered that R.V. be evaluated for Tourette's Syndrome.

At the hearing on June 26, 2006, the trial court expressed concern about R.V.'s "horrendous" emotional and behavioral problems. It also noted its misgivings about DCFS's plan to wait for an ICPC on the paternal grandmother in Oklahoma because she had never met either child. The children's current foster caregiver was not interested in adopting them. The court found the boys were not

adoptable, and found that it was in the children's best interest to temporarily pursue an alternate permanent plan (a "permanent plan living arrangement") in order to investigate whether the children could be returned to Mother's care, as she had been making some progress in complying with the case plan. However, the court also stated its concern about Mother's reported comments that she felt she was under surveillance, and instructed Mother to see her psychiatrist if she felt that way. Mother withdrew her section 388 petition; however, the court ordered that Mother's reunification services would be reinstated for six months pursuant to section 366.3. Mother was ordered to complete three random drug tests.

In a status review report dated October 24, 2006, DCFS reported that the Oklahoma Department of Human Services rejected placing the children with the paternal grandmother, C.H., because L.H.'s father, P.H., resided in the home, and also the home did not have adequate space for the children. R.V. was diagnosed as having ADHD. He had a Therapeutic Behavior Service worker shadowing him at school three days per week, attended a day treatment program every day after school, and had home therapy sessions once a week. Mother had visited sporadically since the last hearing, and had not completed three drug tests; she tested clean once and missed five tests. She was terminated from one recovery program for failure to participate, and although she had reenrolled in another program she had attended only one counseling session. DCFS recommended that Mother's family reunification services be terminated and that the boys be adopted by the Kaw Nation family. The matter was continued for a contested hearing to December 8, 2006, and continued again until January 4, 2007. In the interim, the boys were placed in two more foster homes.

Termination of Reunification Services and Selection of a Permanent Plan of Adoption

On January 4, 2007, the court found that Mother was not in compliance with the case plan, and terminated her reunification services. The boys' foster caregiver did not want to adopt them. The court ordered a permanent plan of long-term foster care, and set the matter for a section 366.26 hearing in May 2007.

In its report dated May 3, 2007, DCFS reported that in April 2007, a pre-placement conference was conducted by telephone with DCFS adoptions social worker (Weisbaum), her supervising adoptions social worker (Franklin-Williams), the DCFS social worker assigned to the case (Charles), her DCFS supervising social worker (Olea), and the Kaw Nation social worker (Roger Sober). According to the report, "information was presented to Roger Sober providing background information on both [L.H.] and [R.V.]." A few weeks later, Sober contacted Weisbaum and said the prospective adoptive Kaw Nation family had decided to move forward with the adoption. However, Sober indicated he was hesitant to remove R.V. from a stable placement knowing that the children had been placed in seven different homes in the past two years. He nonetheless presented extensive information about the prospective adoptive Kaw Nation family. Weisbaum indicated that R.V. was adamant that he did not want to be adopted by the Kaw Nation family, whom he had never met. He said he would feel very good about remaining in his current home and "never leaving." The boys' current caregivers, with whom the children had been placed for two months, had expressed "their extreme interest" in providing a permanent adoptive home for the boys.

Multiple continuances then ensued, apparently because DCFS repeatedly failed to properly notice R.V.'s father, due to illness of Mother's counsel, and because in December 2007 a conflict was declared among the children and new

counsel was appointed to represent L.H. and R.V. on the one hand and their older sister J.R. on the other.

Ultimately, the section 366.26 hearing was held on January 4, 2008. DCFS submitted reports from August 2007 and November 2007. In the August report, DCFS stated that Mother's visits increased in frequency when R.V. was out of school for the summer, and this coincided with a deterioration in R.V.'s behavior. He began stealing, hoarding food, and acting aggressively with L.H. Sober stated by letter dated July 3, 2007 that the Kaw Nation ICW concurred with DCFS's recommendation that the plan should be to proceed with the boys' adoption by their current caregivers, although the Kaw Nation family remained interested if that did not happen.

Mother testified at the hearing that during her weekly visits with the children she played with them, gave them birthday parties, ensured they were properly clothed, and helped them with homework. The boys saw their older sister every other month, and she spoke to them on the telephone more frequently. Mother said that the children loved her. Mother said she did not participate in the children's school activities because no one wanted her to do so. She did not participate in family counseling or the children's medical appointments because no one had given her the opportunity to do so. As Mother was concluding her testimony, she asked to go off the record, but the court declined. Mother continued, "These people that set me up –"; however, the court repeated that it was not going off the record and instructed Mother to step down.

On the basis of Mother's testimony and the information contained in the DCFS reports, Mother's counsel argued that the beneficial relationship exception to adoption should be applied. (§ 366.26, subd. (c)(1)(B)(i).) Counsel for DCFS urged the court to terminate parental rights to give the children the chance to live in a permanent home; the boys' counsel agreed.

The court noted that Mother had been erratic in her progress. At times she visited the children regularly and acted appropriately during visits, but at other times her visits were sporadic and she acted inappropriately. She had been unable to maintain stable housing and employment. She had not provided the court with the clean drug tests it required during the period of time her reunification services were reinstated. As the court was stating its ruling, Mother repeatedly interjected that she had been "set up," until eventually the court asked that she be escorted from the courtroom. The court then proceeded to find by clear and convincing evidence that the children were adoptable, and that the statutory exceptions to adoption did not apply. The court terminated parental rights, and also found beyond a reasonable doubt that return of the children to the parent was likely to cause serious physical or emotional damage to the children, adding, "We have a letter from the Kaw Nation."

This timely appeal followed.

DISCUSSION

I. Our Jurisdiction to Consider Invalidation of Prior Orders

Respondent contends that this court does not have jurisdiction to entertain the request by Mother to invalidate the juvenile court's prior orders based on violations of the ICWA. When a juvenile court fails to comply with ICWA mandates, 25 United States Code section 1914 permits an Indian child, parent, or tribe to petition a court of competent jurisdiction to invalidate any orders made in

violation of sections 1911 through 1913.[3] Similarly, as of 2007, section 224, subdivision (e) has provided that "Any Indian child, the Indian child's tribe, or the parent or Indian custodian from whose custody the child has been removed, may petition the court to invalidate an action in an Indian child custody proceeding for foster care or guardianship placement or termination of parental rights if the action violated Sections 1911, 1912, and 1913 of the [ICWA]."

Respondent argues that the "court" referenced in these statutes is the juvenile court, not the Court of Appeal. California Rules of Court, rule 5.486(b) identifies the juvenile court as a "court of competent jurisdiction." It provides: "If the Indian child is a dependent child or ward of the juvenile court or the subject of a pending petition, the juvenile court is a court of competent jurisdiction with the authority to hear the request to invalidate the foster placement or termination of parental rights." Respondent contends that Mother seeks invalidation in the wrong court because an appellate court does not have before it the evidence and argument that would have been developed in the juvenile court for this purpose, especially where as here the tribe was in agreement with DCFS. It argues that we lack the foundation to make such judgments. In addition, respondent argues that our role is to review the matter for trial court error, not to determine the case on its merits. Where the juvenile court was not given the chance to hear or rule on a petition to invalidate its prior orders, Mother cannot seek invalidation for the first time on appeal.

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[3] Section 1914 provides: "Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title." Section 1912, applicable here, is set forth in the text below.

We disagree with respondent's contention that, as a general matter, we lack jurisdiction to consider invalidation of prior orders based on ICWA violations. (As we discuss below, however, we conclude that Mother's failure to timely appeal from all orders except the termination of parental rights precludes review of those orders.) As stated by the court in *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1411, "Congress has recognized state court jurisdiction over foster care placement and termination of parental rights proceedings ([25 U.S.C.] § 1911(b) & (c)), and the remedy Congress provided for violations of the ICWA was not to void that jurisdiction and transfer the matter to tribal courts but rather to allow parents and tribes to seek invalidation of any proceedings held in error. ([25 U.S.C.] § 1914 ; see *Carson v. Carson* (2000) 170 Or.App. 263 [13 P.3d 523, 525-526, fn. 5] [criticizing *N.A.H.* on grounds that Congress intended state courts to enforce ICWA's notice rules only on the presupposition that they 'otherwise had jurisdiction'].)" But see *In re Jonathon S.* (2005) 129 Cal.App.4th 334, 341-342 ["An appellate court . . . is not a 'court of competent jurisdiction' within the meaning of the enforcement provision."].)

Furthermore, we derive our jurisdiction from the California Constitution. (Cal. Const., art. VI, § 11.) Pursuant to section 11, "courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute." Thus, because the juvenile court was a court of competent jurisdiction to consider invalidation of its prior orders, even if it was not called upon by Mother to do so, we now have jurisdiction to review the proceedings conducted by the juvenile court in purported violation of the federal and state ICWA statutes. Whether Mother can raise these challenges for the first time on appeal is a question of forfeiture (sometimes referred to as waiver), which we shall address, but that fact does not bar our exercise of jurisdiction in the matter. We review the matter for error, i.e., whether the trial court erred by

entering an order terminating parental rights in the absence of statutorily required expert testimony, and in the absence of proper ICWA notice.

II. Lack of Expert Testimony Required by the ICWA

Mother argues on appeal that all orders removing L.H. from her custody must be invalidated because the federal ICWA, and more recently the California ICWA, required that orders placing Indian children in foster care and terminating parental rights must be supported by testimony from a qualified expert witness. Respondent contends that the alleged deficiencies were waived, and that in any event the juvenile court substantially complied with the requirement. As we shall explain, we conclude that only the order made at the termination hearing is properly before us, and while the trial court erred in making the challenged order without the required expert testimony, the error was harmless.

A. *The Applicable Statutes*

Mother seeks to invalidate all orders removing L.H. from her custody because there was no expert testimony presented as required by the federal ICWA and, as of January 2007, by the California ICWA.

1. *Federal ICWA*

Throughout the proceedings at issue here, 25 United States Code section 1912 required, in relevant part (regarding any involuntary proceeding where the court knows or has reason to know that an Indian child is involved): "(e) . . . No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the

child. [¶] (f) . . . No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (25 U.S.C. § 1912, subds. (e) & (f).)

2. *California ICWA*

Effective January 1, 2007, California codified into the Welfare and Institutions Code, with some modifications, the provisions of the federal ICWA. Applicable here, section 224.6 provides: "(b) In considering whether to involuntarily place an Indian child in foster care or to terminate the parental rights of the parent of an Indian child, the court shall: [¶] (1) Require that a qualified expert witness testify regarding whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. [¶] (2) Consider evidence concerning the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices. . . . [¶] (e) The court may accept a declaration or affidavit from a qualified expert witness in lieu of testimony only if the parties have so stipulated in writing and the court is satisfied the stipulation is made knowingly, intelligently, and voluntarily." (Added by Stats. 2006, ch. 838 (Sen. Bill No. 678) § 35.)

In addition, section 366.26 was amended to provide in subdivision (c)(2): "The court shall not terminate parental rights if*:* . . . [¶] (B) In the case of an Indian child: [¶] . . . (ii) The court does not make a determination at the hearing terminating parental rights, supported by evidence beyond a reasonable doubt, including testimony of one or more 'qualified expert witnesses' as defined in

Section 224.6, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child."

Both the federal (25 U.S.C. § 1912) and the state requirements (§§ 246.6 & 366.26) were in effect at the time of the hearing on January 4, 2008 at which the juvenile court terminated parental rights.

B. *The Hearings at Which Expert Testimony Was Required Are Not All Subject to Review*

Mother argues that all orders made after the April 5, 2005 determination that L.H. was an Indian child, by which the juvenile court found he would remain in foster care, must be invalidated based on the lack of expert testimony,[4] as well as the order terminating parental rights entered on January 4, 2008. We conclude, however, that we do not have jurisdiction to reverse any of the earlier orders because Mother failed to file a timely appeal from those orders. "'"'If an order is appealable . . . and no timely appeal is taken therefrom, the issues determined by the order are res judicata.'" [Citation.] "An appeal from the most recent order entered in a dependency matter may not challenge prior orders, for which the statutory time for filing an appeal has passed." [Citation.] Appellate jurisdiction to review an appealable order depends upon a timely notice of appeal. [Citation.]' (*Wanda B. v. Superior Court* (1996) 41 Cal.App.4th 1391, 1396, quoting *In re Cicely L.* (1994) 28 Cal.App.4th 1697, 1705 and *In re Elizabeth M.* (1991) 232 Cal.App.3d 553, 563.) Thus, the only order before us is the order terminating parental rights." (*In re Jonathon S., supra,* 129 Cal.App.4th at p. 340.)

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[4] Specifically, Mother argues the orders made on the following dates must be invalidated: April 25, 2005; June 16, 2005; October 25, 2005; and June 26, 2006.

The federal statute which provides for invalidation of certain orders made in violation of the ICWA, 25 United States Code section 1914, does not contain an express time limitation. However, we conclude that those parties seeking to invalidate orders of the juvenile court remain bound by our state rules regarding the timeliness of appeals. "In our view, 25 United States Code section 1914 confers standing upon a parent claiming an ICWA violation to petition to invalidate a state court dependency action. It may even excuse a parent's failure to raise an ICWA objection in the trial court. (See *Matter of L.A.M.* (Alaska 1986) 727 P.2d 1057, 1059-1060.) However, it does not authorize a court to defer or otherwise excuse a parent's delay in presenting his or her petition until well after the disputed action is final. Nothing in the language of the section supports the mother's view. We recognize courts liberally construe the ICWA for the benefit of Indians. (*Matter of L.A.M.*, *supra*, 727 P.2d at p. 1060, citing *Preston v. Heckler* (9th Cir. 1984) 734 F.2d 1359, 1369.) However, the construction the mother proposes for 25 United States Code section 1914 is not liberal; it is unreasonable given the statutory language." (*In re Pedro N.* (1995) 35 Cal.App.4th 183, 190.) Thus, we will consider on this appeal only the order terminating parental rights entered on January 4, 2008, from which appeal was taken on January 8, 2008.

C. *Waiver or Forfeiture of the Claimed Error*

Respondent contends that Mother, by failing to raise the issue in the juvenile court, has waived for purposes of review any error regarding the expert testimony requirement. We note that the contention is more accurately described as one of forfeiture because it rests not on Mother's intentional and voluntary relinquishment

of a known right, but rather on the loss of the right to raise the issue on appeal based on her failure to perform a required act (i.e., raising the issue below).[5]

Respondent relies on out-of-state authorities as well as pre-2007 California case law to argue that Mother forfeited the issue for appeal. (See *In re Dependency of Roberts* (Wash.App. 1987) 732 P.2d 528, 533; *D.A.W. v. State* (Alaska 1985) 699 P.2d 340, 342; *In re Riva M.* (1991) 235 Cal.App.3d 403, 412; *In re S.B.* (2004) 32 Cal.4th 1287, 1293; and *In re Gilberto M.* (1992) 6 Cal.App.4th 1194, 1198.) We conclude, however, that because the termination hearing took place after the adoption of the California ICWA statutes, those cases do not constitute persuasive authority on the issue.

Unlike the federal ICWA, the California ICWA statutory scheme addresses the subject at issue here, albeit with regard to a different stage of dependency proceedings than the termination of parental rights. As relevant here, section 361 provides: "(c) A dependent child may not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides *at the time the petition was initiated*, unless the juvenile court finds clear and convincing evidence of any of the following circumstances listed in paragraphs (1) to (5), inclusive, and, in an Indian child custody proceeding, paragraph (6): . . . [¶] (6)

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[5] Waiver (as narrowly understood) and forfeiture are distinct doctrines. (*Chase v. Blue Cross of California* (1996) 42 Cal.App.4th 1142, 1148-1149.) "Waiver refers to the act, or the consequences of the act, of one side. Waiver is the intentional relinquishment of a known right after full knowledge of the facts and depends upon the intention of one party only." (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 59.) Unlike waiver, forfeiture involves the loss or nullification of a right from the failure to perform a required act, rather than a voluntary relinquishment of the right. (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 314-315.) Forfeiture, so understood, is defined as "'A deprivation or destruction of a right in consequence of the nonperformance of some obligation or condition.'" (*Chase v. Blue Cross of California*, *supra*, 42 Cal.App.4th at p. 1149.)

In an Indian child custody proceeding, continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and that finding is supported by testimony of a 'qualified expert witness' as described in Section 224.6. [¶] (A) Stipulation by the parent, Indian custodian, or the Indian child's tribe, or *failure to object, may waive the requirement of producing evidence of the likelihood of serious damage only if the court is satisfied that the party has been fully advised of the requirements of the Indian Child Welfare Act* (25 U.S.C. Sec. 1901 et seq.), *and has knowingly, intelligently, and voluntarily waived them*." (Italics added.)

This requirement applies at the time the section 300 petition is initiated; there is no equivalent provision in section 366.26 regarding termination of parental rights. However, we conclude that the quoted provision in section 361 informs our determination of whether Mother can be said to have forfeited any objection to the expert testimony requirement by failing to raise it below. The quoted language evinces an intention on the part of the California Legislature to ensure that parties are fully aware of the expert testimony requirement before it can be waived, and indeed, that an informed waiver based on intentional relinquishment of a known right is acceptable, but forfeiture by a mere failure to object is not sufficient. We therefore proceed to consider the merits of Mother's claim.

D. *Harmless Error*

The juvenile court undoubtedly committed error under both federal and California ICWA standards by failing to require introduction of expert testimony before terminating parental rights. Mother was the only person who testified at the termination hearing. The letter from Roger Sober, which the court apparently relied upon to fulfill the requirement, was insufficient because it did not address the crucial issue, detriment to the children of remaining in parental custody, and his

qualifications as an expert were untested. Furthermore, even if the contents of the letter had been sufficient, under the California statute a written declaration or affidavit (which his letter was not) is only permitted to fulfill the expert testimony requirement if the parent stipulates to that effect in writing.

In *In re Riva M., supra,* 235 Cal.App.3d 403, the father of dependent children who were found to be Indian children contended on appeal that the trial court violated the ICWA (25 U.S.C. § 1912, subd. (f)) by failing to require expert testimony at a hearing to terminate parental rights. The appellate court found that the father had forfeited any error by failing to raise it in the juvenile court.[6] In addition the court held that any error was harmless. "Because the issue is not one of constitutional dimension, the question is whether there is a reasonable probability the outcome would have differed in the absence of the procedural irregularity. (Cal. Const., art. VI, § 13; compare *Deeter v. Angus* (1986) 179 Cal.App.3d 241, 251 [denial of due process is reversible per se].)" (*In re Riva M., supra*, 235 Cal.App.3d at pp. 412-413.) The court concluded that "[t]he evidence was overwhelming that rehabilitation and reunification efforts had failed, and that placement of the children with [the father] would be seriously detrimental, physically and mentally. The evidence supports the requisite findings beyond a reasonable doubt, even without the testimony of an expert witness." (*Id*. at p. 413.) The court observed in a footnote that neither the mother nor the tribe desired custody of the children, and the father was not an American Indian. Therefore, "the 'Indian family' would have been rent asunder in any event. The purpose of the ICWA, to preserve Indian families, could not be implemented. At best,

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[6] *In re Riva M.* was decided in 1991, well before the enactment of the California ICWA. As discussed above, we conclude that the Legislature intended that the requirement of expert testimony cannot be forfeited, but instead must be affirmatively waived.

[father], a non-Indian, would have not lost all parental rights and may have gained custody of the children some day. We are not aware of any case finding a prejudicial failure to apply the ICWA where the appellant's position, if adopted, would not maintain some contact between the Indian child and the Indian culture. (See *In re Crystal K.* [(1990)] 226 Cal.App.3d 655, 663-666 and cases cited.)" (*In re Riva M., supra*, 235 Cal.App.3d at p. 413, fn. 10.)

The case before us is similar. The evidence of Mother's mental health problems and instability was quite extensive. The children were initially detained when Mother underwent psychiatric hospitalization and was diagnosed with paranoid schizophrenia. As part of her case plan, Mother was to receive individual counseling and take prescribed psychotropic medication. She produced evidence that she was under the care of Dr. Farhad Khossoussi, but the information provided by the doctor throughout the proceedings was of little assistance. The doctor simply reiterated each time that Mother had been under his care since February 2005, that Mother was diagnosed with major depression, that she was prescribed antidepressant medication, and that she had improved. It did not appear that Mother was participating in therapy with Dr. Khossoussi, although she attended various counseling and group sessions elsewhere. In fact, Mother continued to exhibit symptoms of mental illness. The reports for April, June, and October 2006, indicated that Mother believed she was under surveillance by the government and by DCFS, and repeatedly expressed throughout the proceedings, including the termination hearing, that she had been "set up" by family members and DCFS. She stated at the termination hearing that she was not taking any medication. She did not complete the drug tests that were required by the court when it reinstated her reunification services, and those services were again terminated in January 2007. The boys' older half-sister, J.R., told the social worker in April 2007 that Mother was not attending her classes, and not taking her prescribed medication.

Mother was evicted from her home in November 2006. She was arrested in April 2007 on charges of inflicting corporal injury on a cohabitant. Mother's visitation rights never progressed beyond twice weekly monitored visits. While Mother's behavior during visits was sometimes described as "quite exceptional," at other times she acted inappropriately and discussed adult matters with the children even after she was told not to do so. In August 2007 DCFS reported that Mother's visits had increased in frequency when R.V. was out of school for the summer, and this coincided with a deterioration in R.V.'s behavior.

On the basis of this information, the court found beyond a reasonable doubt that return of the children to Mother was likely to cause serious physical or emotional damage to the children. Given the evidence before the court, we conclude that there is no reasonable probability the outcome would have differed even if expert testimony had been received by the juvenile court. (Cal. Const., art. VI, § 13; *In re Riva M., supra,* 235 Cal.App.3d at p. 413.) Mother had over three years to demonstrate that she could maintain the stability and mental fitness that were required for the children to be safe in her care. She was clearly unable to accomplish that goal for any length of time. Even her visits remained monitored for the entirety of the proceedings.

Furthermore, we note that the Kaw representative acquiesced that it was in the children's best interest to be adopted by their caregivers rather than by the Kaw Nation family, and implicitly agreed that they should be removed from Mother's custody. Mother had not been found to be an Indian parent (L.H.'s father had Indian ancestry, but was never involved in the proceedings below), and refusal to give *Mother* custody would not interfere with L.H.'s contact with his Indian tribe. Whether parental rights should be terminated had nothing to do with Mother's fitness to care for L.H. according to the cultural dictates of his tribe. (See *State ex rel. Juv. Dept. v. Tucker* (Or.App. 1985) 76 Or.App. 673, 683-684, 710 P.2d 793,

799.) The purpose of the ICWA of preserving Indian families could not be implemented even if parental rights were not terminated. We decline to find a prejudicial failure to apply the ICWA where adopting Mother's position would not result in preservation of L.H.'s contact with his Indian culture. (See *In re Riva M., supra*, 235 Cal.App.3d at p. 413, fn. 10.)

III. Deficiencies in ICWA Notice

Mother argues that the order terminating parental rights must be reversed because DCFS did not comply with several aspects of the ICWA notice requirements. Pursuant to 25 United States Code section 1912, subdivision (a): "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, [DCFS] shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." As of January 1, 2007, section 224.2, subdivision (a)(1) has similarly provided that notice to the tribe "shall be sent by registered or certified mail with return receipt requested." We shall discuss in turn each of Mother's contentions of alleged error in notice.

Mother could not be said to have forfeited any deficiencies in the notice requirements by failing to raise them below because the notice provisions are designed in part to protect the potential tribe's interests. (*In re Alice M.* (2008) 161 Cal.App.4th 1189; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739.)

A. *Notice Given to the Kaw Nation*

1. *The Address and Contact Information Used by DCFS*

Section 224.2, subdivision (a)(2) provides: "Notice to the tribe shall be to the tribal chairperson, unless the tribe has designated another agent for service."

(See also former Cal. Rules of Court, rule 5.664(f)(2), and rule 1439 (f)(2); see *In re H.A.* (2002) 103 Cal.App.4th 1206, 1213.) The BIA "periodically publishes a current list of designated tribal agents for service of notice, along with the appropriate mailing addresses, in the Federal Register." (*In re H.A.*, *supra,* 103 Cal.App.4th at p. 1213; see also *In re Mary G.* (2007) 151 Cal.App.4th 184, 210.) As applicable here, the federal register indicated notice should be sent to the Chairperson of the Kaw Nation at Drawer 50, Kaw City, Oklahoma 74641. (68 Fed. Reg. 68408 (Dec. 5, 2003).) However, here DCFS sent ICWA notice to "ICWA Representative, P.O. Box 237, Kaw City, Oklahoma, 74641."

Respondent points out that the federal register states that Indian tribes may designate an agent other than the tribal chairman for service of notice and that the Secretary of the Interior shall publish the names on an annual basis. The addresses in the register are those received by the Secretary of the Interior prior to the date of the publication. In addition, a Supervisory Social Worker at the BIA may be contacted for further information. As of January 1, 2007, section 224.3, subdivision (c) has provided that one should contact the BIA or the State Department of Social Services (DSS) for assistance in identifying the names and contact information of the tribes.

In this case, the most current DSS list, updated in December 2006, was published four months later than the federal register, which was published on August 2, 2006. The address used by DCFS to provide notice in this case was the one on the DSS list. We find persuasive DCFS's argument that it was permitted to use the contact information on the DSS list, particularly where, as here, actual notice was achieved. "Requiring literal compliance solely by reference to the names and addresses listed in the last published Federal Register would exalt form over substance. The Department should not be hamstrung by limitation to only the names and addresses provided for the tribes in the Federal Register if a more

current or accurate listing is available and is reasonably calculated to provide prompt and actual notice to the tribes. In such instances, it is for the juvenile court to determine as a matter of fact from all the circumstances whether appropriate notice has been given." (*In re N.M.* (2008) 161 Cal.App.4th 253, 268.)

Mother further contends that DCFS erred by thereafter sending notice to Roger Sober at a different address, rather than to the Chairperson of the Kaw Nation. The record indicates that in April 2005, Kaw Nation social worker Roger Sober contacted DCFS by telephone and stated that L.H., his father, and his grandmother were not on the tribal rolls, but L.H. was eligible for enrollment through lineage traced to L.H.'s paternal great-grandfather, and the child therefore came within the ICWA. Sober stated that the Kaw Nation planned to intervene in the case. He requested that further notice of hearings be sent to P.O. Box 237, Newkirk, OK 74647, to his attention; he said his supervisor was Amy Oldfield. Mother argues that an instruction to send notice to a different address and to an addressee other than the tribal chairperson would need to come from the designated chairperson. She contends that there is no evidence Sober had authority to receive notices on behalf of the Kaw Nation, and contends that "there is no substantial evidence to support the finding that the tribe was ever properly notified of the juvenile dependency proceedings." Finally, Mother contends that the fact the July 3, 2007 letter from Sober was on Kaw Nation letterhead with the address for the designated agent is insufficient to establish that the correct person with authority to make decisions for the tribe was actually notified. We disagree.

We find substantial evidence in the record to support the court's determination that appropriate notice was given, where there is overwhelming evidence that *actual* notice was achieved, and that the tribe's opinions and wishes were fully heeded even in the absence of formal intervention by the tribe. Sober and the DCFS social worker communicated on an ongoing basis regarding the

progress of the case. Sober identified a prospective Kaw Nation adoptive family and provided DCFS with extensive information about the family. Ultimately, Sober stated on behalf of the "Kaw Nation ICW," on Kaw Nation letterhead containing the address listed in the federal register, that the tribe concurred with DCFS that the children should not be removed from their current placement given R.V.'s behavioral and emotional issues. He stated that the Kaw Nation ICW Program had a Kaw Nation family that wished to adopt the boys if their current placement failed. He requested that DCFS continue to provide ICW with information about the boys. Numerous courts have held that technical defects in notice constitute harmless error where the tribe responds to the notice. (*In re N.M.*, *supra*, 161 Cal.App.4th at p. 269 [appropriate notice finding upheld where designated agent responded to notices sent to a different person or address, another person responded for the tribe on the tribe's letterhead, or a certified receipt was returned, albeit not personally signed by tribal chairperson or the designated agent]; *In re J.T.* (2007) 154 Cal.App.4th 986, 994 [sending ICWA notices without any specific addressees (i.e., addressed to the designated agents) was harmless error where tribes "responded to the notice with a determination that the minors were not members or eligible for membership in the tribes"]; *In re I.G.* (2005) 133 Cal.App.4th 1246, 1252; *In re S.B.* (2005) 130 Cal.App.4th 1148, 1162.) Here, the tribe not only responded to the notice, it became involved in the proceedings and expressed its views on L.H.'s best interests. The fact the tribe did not file a motion for intervention is of little importance under these circumstances, where it was kept apprised of developments in the case and had the opportunity to fully participate in the matter.

Mother suggests that DCFS was required to receive confirmation directly from the designated agent of the Kaw Nation that Sober was authorized to act on behalf of the tribe. We disagree. There is every indication that Sober is a

legitimate spokesperson for the tribe. Because we must conditionally reverse the order terminating parental rights for a different reason, discussed below, we note that the juvenile court may wish to instruct DCFS to obtain confirmation from the designated agent that Sober was authorized to receive notices and represent the tribe's position, out of an abundance of caution. We specifically decline, however, to reverse the order on this basis.

2. *Subsequent Notices to the Kaw Nation Were Allegedly Incomplete*

Mother contends that after the Kaw Nation notified DCFS that L.H. was eligible for membership, DCFS failed to comply with sending the Kaw Nation the necessary details, required by section 224.4. Specifically, the notices lacked L.H.'s birthdate and birthplace, a list of the other parties given notice, and the court's telephone number. Secondly, Mother contends that the fact notice was sent in October 2005 by first class mail rather than registered mail requires reversal. (See 25 U.S.C. § 1912(a) [applicable before Jan. 1, 2007, requiring provision of notice by registered mail].) Finally, Mother contends that more recent notices state they were sent by certified mail and indicate a copy of the certified mail notice is attached, but in fact copies are not attached.[7]

We decline to exalt form over substance. We will not reverse on the basis of the errors asserted here, where the tribe had actual, ongoing notice of the substance of the proceedings, as well as the opportunity to weigh in on the decisions made for the Indian child involved.

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[7] As of January 1, 2007, section 224.2, subdivision (a)(1) has provided that certified mail could be used.

B. *Notice to the Northern Cheyenne*

Mother told DCFS that she had Cheyenne heritage. Accordingly, on February 2, 2005, DCFS sent notice of hearing to the Northern Cheyenne at P.O. Box 128, Lame Deer, Montana 59043, but the notice did not include the designated agent, "Director, Tribal Social Services." The court noted at the hearing on February 23, 2005, that it had a return receipt from the Northern Cheyenne but there was no response letter from that tribe.

More importantly, the information provided on the notice was incomplete. L.H.'s paternal grandmother's address was not on the notice. Her address was missing from the JV-135 form even though a social worker had spoken to her, and she had indicated she was registered with both the Kaw and the Cheyenne.

DCFS concedes that the notice given to the Northern Cheyenne tribe was insufficient. (See *In re S.M.* (2004) 118 Cal.App.4th 1108, 1116 [primary purpose of giving notice is to enable tribe to determine whether child is an Indian child].) However, respondent requests that we enter a limited reversal for the sole purpose of remanding the matter with directions to the juvenile court to require proper ICWA notice to the Northern Cheyenne tribe, with the order terminating parental rights to be reinstated if the tribe indicates the children are not members or eligible for membership. If one or both children are determined to be Indian children, the juvenile court is ordered to conduct the new permanency planning hearing in conformity with all provisions of the ICWA (including the requirement that expert testimony must be introduced regarding detriment from return to parental custody). We agree that reversal pursuant to these terms is required and appropriate.

C. *Notice to the Secretary of the Interior*

With the passage of the California ICWA, a new requirement was implemented whereby, even if the identity of a dependent child's tribe is known,

copies of notices shall also be sent directly to the Secretary of the Interior, unless the Secretary has waived notice in writing, and proof of waiver is filed with the court. (§ 224.2, subd. (a)(4).) The statute went into effect on January 1, 2007, so it did not exist at the time DCFS sent the original notices in 2004 and 2005. The federal ICWA applied, and required that notice be sent to the Secretary of the Interior only if the identity of the tribes was uncertain. Mother argues by implication that section 224.2 applied to these proceedings, such that DCFS was obligated to begin serving notice to the Secretary of the Interior starting in 2007.

We find no reversible error. The record contains a return receipt from the Secretary of the Interior (dated February 16, 2005), as well as a responsive letter indicating it had received notice. DCFS also sent notice to the BIA (the Secretary of the Interior's designated agent) for the March 24, 2005 hearing, and Mother does not contend there was any defect in the notice sent to the BIA.

IV. Finding of Adoptability

Mother argues the trial court erred in finding the boys adoptable, given R.V.'s emotional and behavioral problems. The boys were found by the trial court to be a bonded sibling group, so lack of adoptability of one would affect the other.

Mother did not raise the issue of the children's adoptability at the section 366.26 hearing. Respondent urges us to therefore consider the issue waived, and authority exists which would support such a resolution of the matter. (See, e.g., *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846; *In re Crystal J.* (1993) 12 Cal.App.4th 407, 411-412; *In re Urayna L.* (1999) 75 Cal.App.4th 883, 886.) However, we will consider the issue of adoptability, if only to demonstrate that trial counsel was not ineffective for failing to argue the issue. (See, *Deborah S. v. Superior Court* (1996) 43 Cal.App.4th 741, 748, fn. 5.)

We review the factual basis of a termination order to determine whether the record contains substantial evidence from which a reasonable trier of fact could find a factual basis for termination by clear and convincing evidence. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) A juvenile court can terminate parental rights only if it determines by clear and convincing evidence the minor is likely to be adopted. (§ 366.26, subd. (c)(1).) In determining adoptability, the focus is on whether a child's age, physical condition and emotional state will create difficulty in locating a family willing to adopt. (§ 366.22, subd. (b); *In re David H.* (1995) 33 Cal.App.4th 368, 379.) "Usually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family." (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650, italics omitted.)

Mother argues that the record shows that R.V. was found to be adoptable only because his current caregivers are interested in adoption. However, the record before us contains substantial evidence supportive of the conclusion that it is likely R.V. will be adopted, and not simply because his foster parents wish to adopt him. Although the record indicates he was to be evaluated for impairment in his vision and for Tourette's Syndrome, there is no indication his vision is impaired, and he was diagnosed not with Tourette's, but as displaying behavior consistent with ADHD. Mother fails to sufficiently acknowledge portions of the record indicating R.V. "appears to be developing age appropriately," and "is very smart and communicates very well with others." He had apparently made considerable progress; indeed, recent setbacks in his behavior coincided with an increase in

visitation time with Mother. The record demonstrates that R.V.'s physical and emotional condition at the time of the hearing did not appear to concern the court or counsel. In addition, the record indicates that "information was presented to Roger Sober providing background information on both [L.H.] and [R.V.]," and a few weeks later, Sober told DCFS the Kaw Nation family had decided to move forward with the adoption. Thus, the family apparently was informed about R.V.'s characteristics, yet continued to express an abiding interest in adopting both boys if their foster caregivers cannot do so. We therefore conclude that substantial evidence supports the trial court's finding that R.V. is adoptable.

V. Exceptions to Adoption

A. *Beneficial Parental Relationship*

It is clear that Mother loves R.V. and L.H. and has attempted to maintain a caring relationship with them. However, we are ultimately bound, in reviewing an order from a section 366.26 hearing, to uphold the court's conclusion if it is supported by substantial evidence. (*In re Cliffton B.* (2000) 81 Cal.App.4th 415, 424; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576-577.)

Once dependent children are found likely to be adopted, the court is required to terminate parental rights and order the children placed for adoption unless "(B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd.

(c)(1)(B)(i).) Mother contends that the juvenile court erred by failing to apply this exception with regard to her children, R.V. and L.H. We disagree.[8]

"'In the context of the dependency scheme prescribed by the Legislature, we interpret the "benefit from continuing the [parent/child] relationship" exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.' [Citation.]" (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418; accord *In re Jamie R.* (2001) 90 Cal.App.4th 766, 773.) The exception referred to in section 366.26, subdivision (c)(1)(A) "'applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.' [Citation.]" (*In re Beatrice M., supra,* 29 Cal.App .4th at p. 1419.)

Mother's compliance with the case plan has been sporadic at best, and she has struggled at times to maintain contact with the children. Her visits have

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[8] Mother further contends that reversal is required because the juvenile court made its determination to terminate parental rights based on the false understanding that an agreement was in place that Mother would have contact with the children after they were adopted. No such agreement existed. The minute order indicates that the foster caregivers were given discretion to determine whether there would be visitation with Mother. Mother bases this assertion on the statement by the court that the Kaw Nation had "indicated that, with contact post-adoption, they believed that it was in the children's best interest to remain where they are." Based upon our reading of the record, we conclude the only reasonable interpretation of this comment is that the court was referring to post-adoption contact with the tribe, not post-adoption contact with Mother.

remained monitored throughout the proceedings, and at times she has not taken full advantage of the visitation she was permitted to have. Although her visits with the children were enjoyable for them, she clearly does not occupy a parental relationship. She acknowledged that she did not participate in the children's school activities, their medical appointments, or any conjoint counseling. Mother and her sons undoubtedly have a loving relationship, which unfortunately was disrupted by Mother's mental illness and ensuing difficulties. However, we nonetheless must conclude that the court did not abuse its discretion in concluding the relationship was not of the nature required to prevent termination of parental rights.

B. *Sibling Relationship*

The juvenile court is also permitted to decline to terminate parental rights and choose a permanent plan other than adoption if the court finds a compelling reason for determining that termination would be detrimental to the child where "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(B)(v).)

Mother contends that the boys had a valuable relationship with their older half-sister, J.R., which should be preserved, and that the only way to accomplish that goal is to preserve their legal relationship. J.R. was a subject of the initial section 300 petition and was placed with them in the maternal aunt's home for a brief time, but was moved to a group placement. She has stayed in touch with the

boys, however, as she grew into adulthood (turning 18 years old in September 2006), and was granted unmonitored visitation with them. She had played a parental role to the boys during Mother's periods of mental illness, and during the proceedings expressed a desire to obtain custody of the boys. Unfortunately, that was not possible given that J.R. has faced her own struggles as she has attempted to take care of herself and find her feet after an unsteady childhood.

R.V. and L.H. are substantially younger than J.R., who has moved into a different phase of life. Their situation simply does not fit well within the sibling exception to adoption. R.V. and L.H. have a chance to be adopted by a loving family while they are still young, and there can be no doubt that the benefit to them of that happening would far outweigh any benefit they would receive from maintaining a legal relationship with J.R. They are important to one another, and hopefully will be able to maintain a meaningful relationship, while still enabling the boys to be adopted and cared for by a stable family.

DISPOSITION

The order terminating parental rights is reversed. On remand, the juvenile court is directed to conduct a limited remand restricted to ordering DCFS to properly comply with the notice provisions of the ICWA with regard to the Northern Cheyenne tribe. If, after proper inquiry and notice, no response is received from the tribe indicating the children are members or eligible for membership, the court shall reinstate its order terminating parental rights. If, after proper inquiry and notice, the Northern Cheyenne tribe determines that the children are Indian children, the juvenile court is ordered to conduct the new permanency planning hearing in conformity with all federal and California ICWA provisions.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.